

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
Appellant,)	C.A. No. N14A-10-003 FSS
)	
v.)	
)	APPEAL
BRENDA BOYCE,)	
)	
Appellee.)	

Submitted: July 2, 2015
Decided: August 24, 2015

ORDER

Upon Appeal from the Industrial Accident Board – AFFIRMED

1. The State appeals the Industrial Accident Board’s awarding Brenda Boyce temporary total disability from March 4, 2014, when she wrenched her back walking across her employer’s parking lot in bad weather, through August 5, 2014. The primary issues below were (1) whether the accident happened as Boyce testified and (2) if so, whether it caused injury to Boyce’s low back, neck, and right shoulder, requiring the treatment she received. The State contests Boyce’s version of the accident and argues the Board’s finding Boyce temporarily totally disabled was not supported by substantial evidence.

2. According to Boyce, she injured her neck, low back, left buttock, shoulders, and hip after slipping on ice upon arriving for work at Christiana High

School around 7:40 AM March 4, 2014. Boyce had to walk around a milk delivery truck parked in front of the school. As she stepped onto the curb, she lost her balance and strained her back, trying not to fall. She did not fall and continued walking into the school.

3. A fellow employee testified she saw Boyce walk into the school that morning. Boyce arrived at about the same time as the co-worker, who then watched Boyce carefully cross the parking lot toward the school. According to the co-worker, as Boyce passed the delivery truck, she made some kind of movement, which the co-worker assumed to be Boyce greeting the truck driver.

4. A different co-worker testified that Boyce changed her story. According to this co-worker, Boyce first told a custodian, who did not testify, that she slipped and fell. But, according to hearsay, she changed her story when she learned that the parking lot was under surveillance, then reporting that she only slipped, catching herself before falling. The surveillance video of the parking lot showed Boyce walking into the school, but the Board did not find it helpful because it did not clearly show Boyce's movements, failing to confirm or refute Boyce's claims.

5. Boyce entered the school's kitchen and began to work. After pushing and stacking several milk crates, she felt pain. So, she stopped working and told her supervisor that she had hurt her back after slipping. She eventually saw the

school nurse. Then, Boyce drove home and scheduled an appointment with her physician, Dr. Adams, for two days later. Dr. Adams totally disabled Boyce and referred her to physical therapy.

6. When she did not respond to treatment, Boyce was referred to Dr. Glassman. Dr. Glassman concluded that Boyce sustained several injuries, including a cervical strain and sprain, thoracic strain and sprain, lumbosacral strain and sprain, and radiculopathy. Dr. Glassman made specific positive findings, such as tightness in the neck bordering on spasm, tenderness in response to palpitation, and a limited range of motion. Dr. Glassman prescribed Tylenol with codeine, physical therapy, and chiropractic treatment.

7. Familiar with Boyce's prior back pain, Dr. Glassman opined that Boyce did not merely aggravate a preexisting condition. Dr. Glassman was also aware of a March 23, 2014 incident where Boyce fell down some stairs at home. He opined that this fall may have aggravated Boyce's injuries, but that her strains and sprains were causally related to her March 4, 2014 work incident.

8. Dr. Sommers examined Boyce on July 7, 2014. He diagnosed her with low back, shoulder, cervical, and shoulder joint pain and recommended physical therapy, but he did not agree with Dr. Adams and Dr. Glassman's total disability findings. Dr. Sommers doubted Boyce's credibility and whether she suffered any

injury at all. He based his conclusions on the surveillance video and inconsistencies in her medical records and her account of the accident.

9. The State argues that the Board disregarded the pre-accident surveillance video and the eyewitness account mentioned above and, instead, relied on Dr. Glassman's medical observations. Dr. Glassman's observations, however, relied on Boyce for both her medical history and an account of her accident, which the State contends was incomplete and inaccurate. In other words, according to the State, the Board ignored objective evidence and based its decision merely on Boyce's self-serving, subjective account.

10. The State also argues that the Board failed to consider the entirety of the evidence. Because it deemed the surveillance video inconclusive, the State suggests the Board should have relied on other objective evidence. The State considers the Board's choice to rely primarily on Dr. Adams and Dr. Glassman's subjective testimony as legal error. The State posits that such reliance is misplaced given Dr. Sommers's conflicting diagnosis and other circumstantial evidence.

11. The State points to surveillance videos after the work accident supposedly proving Boyce could have returned to work earlier than August 5, 2014. The State shared these videos with Boyce and argued them at the Board's hearing. The first video shows Boyce scraping ice from her car March 13th and 15th. The

second video shows her pushing a shopping cart July 24th and 25th. The State, however, does not claim that this evidence disproves Boyce's account of her March 4, 2015 work accident.

12. The court reiterates its limited role on appeals from the Board: The court's only role is "to determine whether the [Board's decision] is supported by substantial evidence and free of legal error."¹ Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion."² "The court will not weigh evidence, determine questions of credibility, or make its own factual findings and conclusions."³ The law is well-settled that the Board, not the court, is responsible for deciding which medical expert is more believable.⁴ Questions of law are reviewed *de novo*.⁵

13. The Board's decision here resolves factual issues, such as Boyce's credibility compared to her coworkers' and its preference for Dr. Glassman's opinion over Dr. Sommers's. And, the Board is responsible for evaluating the evidence and

¹ *Standard Distrib. Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006).

² *Id.*

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁴ See *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003); *In re Fieni*, C.A. No.: N14M-01-046 FSS, 2014 WL 2444795 (Del. Super. Apr. 29, 2014) ("The standard of review indirectly favors the Board's decision even more when the expert's opinions are based on subjective symptoms described to the expert by a petitioner. That is because the court is unable to assess a petitioner's credibility remotely.").

⁵ See *Manyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

determining the facts. Given the surveillance video's inconclusiveness, the Board acted within its discretion to weigh the testimony.

14. The inconsistencies between Boyce's recollection and her co-workers' testimony can be disregarded. Moreover, the Board found the surveillance video inconclusive due to its poor quality. Although the Board found "no sign that [Boyce] was injured in the video, such as an altered gait after the time when [Boyce] was allegedly injured[,]” the Board concluded that it could not “adequately determine whether [Boyce]'s gait had changed.” In addition, Boyce's co-worker's version of the events was as inconsistent as Boyce's. The fact that the witness did not see the moment when Boyce slipped, or characterizes Boyce's movement as greeting the delivery truck driver, neither disproves nor discredits Boyce's testimony. Also, although another co-worker claimed Boyce changed her story, Boyce contends that she never claimed she fell. And, the Board accepted Boyce's version of the events after hearing all the testimony.

15. The post-accident surveillance does not contradict Dr. Glassman's diagnosis. The weight the Board placed on Dr. Glassman's medical opinion does not have to be discounted due to this evidence. The court observes that no expert opined that the surveillance merely showing Boyce pushing a shopping cart revealed anything contrary to Boyce's testimony or to Dr. Glassman's opinion. The videos do

not prove that Boyce was uninjured, much less that she was able to resume work.

16. The controversy regarding the weight placed on Dr. Glassman's testimony in light of Dr. Sommers's is not grounds for reversing the Board's decision. According to Dr. Glassman, soft tissue injuries, such as Boyce's, are consistent with Boyce's accident. Dr. Glassman's objective findings further justify his diagnosis. Thus, even beyond Boyce's subjective reports to Dr. Glassman, there is objective evidence supporting Dr. Glassman's opinion. In summary, Boyce's own account of the incident, which the Board credited, coupled with Dr. Glassman's opinion, which was based on subjective symptoms provided by Boyce and objective finding by him, amount to substantial evidence.

For the foregoing reasons, the Industrial Accident Board's decision is

AFFIRMED.

IT IS SO ORDERED.

/s/ Fred. S. Silverman

Judge

cc: Prothonotary (Civil)
William D. Rimmer, Esquire
Joseph W. Weik, Esquire